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No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

LOUIS FERRARI,
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Issue Involved.

This writ of error is prosecuted to reverse the judgment of the District Court for the Southern Division of the Northern District of California, Division No. Two, entering judgment in favor of the defendant, F. Romeo & Co., Inc., upon a verdict of the jury in favor of said defendant. The action against the defendant F. Romeo individually was voluntarily dismissed during the trial by the plaintiff.

The contention of the plaintiff as set forth in its complaint is that the defendant, on the second day of May, 1919, in consideration of the discount by

the said plaintiff of the draft dated May 2, 1919, payable to F. A. Mennillo, and drawn on F. Romeo & Co., Inc., for the sum of five thousand seven hundred forty-three dollars and sixty-three cents ($5743.63) at sixty days' sight, orally promised and agreed to pay said draft upon maturity (Tr. folio 1, par. 4 and 5, page 2).

The defendant in its pleading did not deny the execution or delivery of the draft, nor the agreement to accept the same, but alleged that the agreement to accept the draft was conditioned upon the arrival of the olives in New York in a satisfactory condition. We quote from the answer of the defendant the following:

> "On or about the 2nd day of May, 1919, defendant F. Romeo & Co., Inc., paid to one F. A. Mennillo on account of the purchase price of certain preserved olives for human consumption theretofore purchased or agreed to be purchased from said F. A. Mennillo by said defendant F. Romeo & Co., Inc., the sum of eight thousand ($8000) dollars, and *orally promised* said F. A. Mennillo that if said olives, which had theretofore been shipped by said F. A. Mennillo to the City of New York, in the State of New York, should, upon examination by defendant F. Romeo & Co., Inc., at the warehouse of defendant F. Romeo & Co., Inc., at the said City of New York, prove to be of good quality and condition, as provided in the contract of purchase of said olives theretofore entered into between said F. Romeo & Co., Inc., and said F. A. Mennillo, and as represented and warranted by said F. A. Mennillo, defendant F. Romeo & Co., Inc., *would accept a draft* for the sum of five thousand seven hundred and forty-three and

63/100 ($5743.63) dollars drawn by said F. A. Mennillo upon said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., payable at sixty (60) days' sight to the order of F. A. Mennillo." (Tr. folio 6, pages 6 and 7.)

Phases of the Case.

The Court below, in summing up the case, correctly divided the same into two phases, namely:

First, assuming that the promise of the defendant was unconditional, as claimed by the plaintiff, then it was only incumbent upon the plaintiff to prove the promise, the presentation of the draft and the refusal to accept or pay, and the condition or quality of the merchandise shipped became entirely immaterial in the case.

Second, assuming that the promise to accept was conditioned upon the arrival of the olives in New York in a satisfactory condition and proved to be of good quality, then it was incumbent upon the plaintiff to prove, by a preponderance of the evidence, that the olives were either in a satisfactory condition and were of good quality, or that the defendant, by accepting them, waived its right to complain about the condition or character of the merchandise.

For the sake of convenience in the following discussion we shall refer to said phases as the first and second, respectively.

FACTS SUPPORTING PLAINTIFF'S CONTENTION ON FIRST PHASE.

In pointing out to the Court the evidence which sustains the plaintiff's contention on all matters of fact, we are mindful of the rule that this Court will not resolve any conflict in testimony and that on all points where there is a conflict the defendant is entitled to the presumption that the jury resolved the conflict in its favor. Notwithstanding this rule, however, we confidently maintain that all the testimony supports, without contradiction and without conflict, our contention that the promise made by the defendant F. Romeo & Co., Inc., to accept the draft was absolutely unconditional.

It is agreed by both sides that the only promise with reference to this transaction was made at the Bank of Italy, Seventh and Broadway, Los Angeles, California, on the 2nd day of May, 1919 (Tr. folio 43, pages 50-51).

On this point the plaintiff produced the following testimony, to-wit:

Testimony of C. R. Mennillo:

> "I got word from the Bank of Italy that there was some transaction going on with reference to some olives, and I went to the Bank of Italy at Los Angeles, 7th and Broadway Branch, and there I met Mr. and Mrs. Romeo. * * * The parties who took part in that conversation were James Moore, vice-president, I presume, of the Bank of Italy, Mr. F. Romeo, his wife and myself. They had two bills of lading and the amount was $13,743.63, and Mr. Romeo informed us that his New York concern, the

amount of the letter of credit opened was only $8,000, and if he could be obliged to give them a draft for the balance at sixty days. The bank seemed to be satisfied with the arrangement and the transaction was closed right there." (Tr. folios 36 and 37, pages 41 and 42.)

Testimony of James O. Moore:

"At the Bank of Italy, Mr. Romeo, I believe, came into the office first and Mr. Mennillo followed shortly after with a bill of lading covering either a car or two carloads of olives, against which the East River National Bank issued an acceptance credit up to $8000, I believe, I am just a little vague on that, together with a draft payable on arrival of goods or at sight, which Mr. Romeo O. K.'d and accepted the bill of lading for. I refer to two drafts, one for $8000, which was covered by the East River guaranty, and the other the draft, Plaintiff's Exhibit No. 1. At the time the draft sued on here was drawn there were present Mr. Romeo, Mr. Mennillo and, I believe, Mrs. Romeo. This draft was simply to take up the balance between the invoice and the letter of credit. * * * This draft, Plaintiff's Exhibit 1, represents the excess of the invoice for the two cars of olives over the letter of credit." (Tr. folios 38 and 39, pages 44 and 45.)

Testimony of Mr. T. W. Lacy:

"As nearly as I can relate the conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Company, which we did, and we gave R. Mennillo & Company credit for the face value of the draft. I was not there during the whole of the conversation. Mr. Moore called me up when part of the conversation had been completed, if I remember correctly. At

> that time Mr. Romeo stated that upon arrival of the goods in New York they would accept the draft. * * * Mr. Romeo stated the draft would be accepted upon its presentation and arrival of the goods in New York. * * * The draft for $5,743.63 was present at the meeting and was already drawn when Mr. Romeo said that it would be accepted upon its presentation and arrival of the goods in New York." (Tr. folios 40 and 41, pages 46 and 47.)

To contradict this testimony the defendant called two witnesses, one of whom, Mrs. Marie J. Romeo, when asked concerning the conversation in question, testified as follows:

> "I was at the Bank of Italy on the 2nd day of May, 1919. I fixed that date because it was my birthday and my husband brought me a bouquet of red roses. I could not say that I heard the conversation that there took place. I knew what I was there for and I very likely heard it because I am not deaf altogether, but I do not remember positively. I guess I sat about this distance (indicating) from Mr. Moore's desk; I could not say that I paid particular attention to the conversation; it is hard to tell what was said; I don't know. I did not know I was going to be put in this chair to report it and I did not pay any particular attention; I knew what we went there for. I had been at the bank several times previously with Mr. Romeo and on each occasion it was for the transaction of the same kind of business—the taking up of letters of credit for other shipments of different kinds of goods." (Tr. folio 65, page 80.)

It is a significant fact that this witness, just before she was asked concerning the conversation

at the bank, was able to give the exact details of a purported conversation which she claimed was held between her husband and Mr. Mennillo with reference to this transaction at the Clark Hotel. Under these circumstances it is not only fair and reasonable to construe this testimony as in no way conflicting with the testimony of the previous witnesses hereinbefore set forth, but as a strong corroboration of the same.

We now take up the testimony of the only other witness to this transaction produced by either party, with reference to the conversation in question, namely, Mr. Francisco Romeo, president of the defendant F. Romeo & Co. Inc., and its representative in the instant transaction.

At the very outset we desire to call attention to the fact that the testimony of this witness is subject to all the infirmities and criticisms which we made against the testimony of Marie J. Romeo. This witness testified in extreme detail concerning the conversation with Mr. Mennillo, which conversation took place two days before the transaction in question and at which conversation no representative of the Bank of Italy was present and the substance of which conversation was never made known to any of the representatives of the Bank of Italy (Tr. folio 43, page 50).

After giving the details of the conversation with Mr. Mennillo which took place apparently on the 30th of June, the witness Francisco Romeo, on direct examination, testified as follows:

> "We went to the bank on May 2nd, and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo. I told him that we were not paying the full amount of that invoice because I had not examined the quality of the goods. The amount of the invoice of those two cars was $13,743.07, I think. At the bank there was no conversation about this draft." (Tr. folio 43, page 51.)

The foregoing is all the testimony of the witness Francisco Romeo, which was offered by the defendant to substantiate the allegation in the answer of the defendant to the effect that the promise to accept the draft was conditional. We submit there is not one word in said testimony that shows that the acceptance of the draft in question was dependent upon any conditions whatsoever, nor is there anything in the testimony just quoted denying or tending to deny the testimony of the witnesses whose testimony has been referred to and who testified that the promise in question was absolutely unconditional. The testimony of said Francisco Romeo may be absolutely true, and yet the testimony in this record will show without contradiction or conflict that the promise to accept the draft was absolutely unconditional. It may possibly be contended by the defendant in this case that the lack of testimony on this particular subject in the direct examination of the witness Francisco Romeo, was due to the fact that the questions propounded to him were not specific enough and not pointed enough.

In order to remove the foundation for such contention we turn to the cross-examination of this

witness, where counsel for the plaintiff directly and pointedly asked of the witness Francisco Romeo questions touching the very gist of the contentions of the defendant as set forth in its answer. From the cross-examination of said witness we call attention to the following:

> "I do not remember exactly that we again had the same conversation in the bank which we had previously had with Mr. Mennillo at the Clark Hotel with reference to this shipment. It was all agreed he was going to draw sixty days' sight draft for the balance and my firm was to accept the draft after approval of the quality of these two cars in transit. We were to accept and pay the draft if the quality of the goods was satisfactory." (Tr. folio 47, page 57.)

After the witness had testified as follows and in order that there might be absolutely no question as to the condition of the testimony of Francisco Romeo on this point, counsel for plaintiff asked the direct question almost in the words used by the defendant in alleging the conditional nature of the promise in its answer as follows:

> "Q. *Are you sure, Mr. Romeo, that anything was said in the Bank of Italy when you went there to negotiate that draft with reference to the condition that the draft was only to be paid in the event that the goods were satisfactory?*
>
> "A. There was no conversation on the subject."

The witness continued to testify:

> "If I am not mistaken, I *think* I reported to Mr. Moore the agreement. I am not positive,

but Mr. Moore was satisfied to take that $8000. Mr. Moore knew the condition because I stayed there about half an hour in the bank and we were talking about this transaction.

"Q. But it is quite possible, Mr. Romeo, that you did not specifically make that conditional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

"A. That was understood; Mr. Moore knew that.

"Q. You say he knew that. You had never talked to Mr. Moore about it?

"A. Well, I stayed there about half an hour in the bank, and we were talking about this transaction.

"Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

"A. Well, if I had promised to accept it on that condition, I would expect that I would.

"Q. That is not an answer to the question. You are not positive, as you have just stated?

"A. I think we had the conversation, otherwise Mr. Moore would not have accepted the draft." (Tr. folio 48, pages 57, 58.)

It will be noted from the foregoing that the witness on direct examination and on cross-examination was given every opportunity to testify that the acceptance of the draft was dependent upon the arrival of the goods in New York satisfactory as to condition and quality. He was given every opportunity to substantiate by direct, clear and concise testimony the allegations of his answer on this subject, but instead of embracing the opportunity, the witness, who for all intents and purposes was

the defendant itself, resorted to evasion, and the only time that he was compelled to give a direct answer as to whether or not the draft was subject to the condition in question, he replied directly:

"There was no conversation on the subject."

We respectfully submit that the testimony of this witness, stripped of its argumentative and evasive features, absolutely substantiates the claim of the plaintiff, that in so far as the Bank of Italy was concerned the promise to accept this draft was absolutely unconditional.

On redirect examination counsel for the defendant, realizing that the testimony of the witness Francisco Romeo had corroborated all the witnesses for the plaintiff, endeavored to get the witness to testify that the promise was conditional, but signally failed. The witness in the redirect examination testified to no agreement whatsoever, but made the following statement:

> "The draft was to be accepted after examination and approval of the quality of the olives. That was said in Mr. Moore's presence." (Tr. folio 54, page 65.)

Clearly even this statement elicited on redirect examination after the witness had directly denied on direct examination and on cross-examination that there was any conversation held in the Bank of Italy to the effect that the promise to accept the draft was to be conditional, cannot, even though it be given full weight, be considered as even raising a conflict in the evidence. There is nothing in the

statement just quoted to show that Mr. Moore ever heard the statement or ever acquiesced in the same, or that there was ever any agreement with reference thereto, and the defendant in this case is left in the position where it has been unable to produce any testimony at all sufficient to even raise a conflict in the evidence, and for this reason all the testimony in the case supports the contention of the plaintiff, namely: that the promise to accept the draft was unconditional.

Not only does all the direct testimony, without conflict, show that the promise of the defendant in this case to accept the draft in question was unconditional, but all the circumstances point to the same conclusion. According to the testimony of Mr. Francisco Romeo and Mrs. Marie J. Romeo, the understanding that the draft was to be conditional was fully discussed with Mr. Mennillo a few days prior to May 2, 1919, and it is a significant fact that both Mr. and Mrs. Romeo remembered in detail the said previous conversation, but neither was able to give any particulars of any similar conversation that took place at the Bank of Italy. The only reasonable and natural inference to be drawn under these circumstances is that Mr. Romeo, having had the agreement with Mr. Mennillo, did not consider it necessary to inform the bank of the conditional nature of the transaction. That Mr. Romeo was mistaken in this cannot in any way help the case of the defendant nor create a conflict in the testimony where none exists.

Another powerful circumstance showing that the promise in this case was unconditional is the admitted fact that upon the discount of the draft by the Bank of Italy the bills of lading covering the goods in question were delivered to Francisco Romeo for the defendant. It is inconceivable that the bank would have delivered the bill of lading to Mr. Romeo on a conditional promise to accept the draft as claimed by the defendant. The fact that the bills of lading were delivered to the defendant at the bank shows that the bank fully relied upon the promise of the defendant to accept the draft and that in so far as the delivery of the goods was concerned the bank considered the transaction was complete.

The only other necessary elements to complete the case of the plaintiff were the proof that the Bank of Italy relied upon the promise and parted with the money and that the draft was duly presented and that acceptance and payment were refused by defendant. On these matters the testimony is entirely one way. That the Bank of Italy paid face value for the draft in question is shown by the following uncontradicted testimony:

F. A. Mennillo:

> "I don't know if they credited all at one time or at different times, but I got credit for the full amount of the invoice for both cars." (Tr. folio 30, pages 33-34.)

C. R. Mennillo:

> "We were given credit by the bank for $13,743.63."

* * * * * * *

"I know the Bank of Italy gave F. A. Mennillo credit for the amount of this draft. I had the bank book and it was entered in said book. I know also from the bank statement." (Tr. folio 37, pages 42-43.)

James O. Moore:

"I thereupon gave F. A. Mennillo & Co. credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with $8000 and with $5743.63." (Tr. folio 39, page 45.)

T. W. Lacy:

"And we gave R. Mennillo & Company credit for the face value of the draft." (Tr. folio 40, page 46.)

The foregoing testimony was neither questioned nor contradicted by any witness or other testimony offered by the defendant.

On the question of the presentation of the draft and its refusal, the same was proven without contradiction by the following testimony from officers of the defendant corporation:

Joseph Lodato:

"A draft was presented to me by the East River National Bank for the Bank of Italy, a copy of which draft is set out in paragraph five of the complaint; I do not remember the exact date when this draft was presented, but it must have been after May 2nd. It was presented after the arrival of the car of Greek style olives and the first car of ripe olives. Mr. Italiano and I were present when it was presented by the East River National Bank, by messenger. * * * I told the messenger that we would not accept

the draft as we did not find the goods satisfactory. The messenger then went back to the bank." (Tr. folio 27, pages 29-30.)

Continuing:

"The board of directors of F. Romeo & Company agreed to refuse acceptance of that draft because the goods were not satisfactory, and they authorized me to so refuse the acceptance, which authorization was not in writing." (Tr. folio 29, page 31.)

Giovanni F. Romeo:

"I first learned that they had it when Mr. Lodato told me that the bank had presented for acceptance and had refused to accept this draft as we had previously agreed to do." (Tr. folios 70-71, page 87.)

Mr. Lodato and Mr. Romeo were both officers actively in charge of the business of the defendant corporation. Therefore under the theory adopted by the trial Court in this case, and the soundness of which theory has not been challenged by either of the parties, the plaintiff was entitled to judgment on the ground that the evidence, without conflict, proved and substantiated all the allegations of its complaint.

EVIDENCE SHOWS ACCEPTANCE OF GOODS.

Even if the promise in this case was contrary to the evidence, assumed to be conditional, the plaintiff would be entitled to recover in this action for the reason that the evidence clearly shows that the defendant accepted the goods in question.

It was shown by said testimony, without conflict:

First, that the bill of lading was actually delivered to Mr. Romeo at Los Angeles and forwarded by him to a firm in New York.

Testimony of Francisco Romeo:

> "I do not know if it was Mr. Moore or Mr. Mennillo who gave me the bill of lading as we were sitting there. I do not know if it was the Bank of Italy or Mennillo." (Tr. folio 49, page 59.)

Again:

> "I received the bills of lading covering these two carloads, at the bank." (Tr. folio 54, page 65.)

Testimony of T. W. Lacy:

> "The conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Co., which we did." (Tr. folio 40, page 46.)

Testimony of Joseph Lodato:

> "F. Romeo sent through the mail two invoices attached to the two bills of lading. These bills of lading did not provide for inspection of the olives." (Tr. folio 26, page 28.)

Second, that the goods were removed to the store of the defendant.

Testimony of Giovanni F. Romeo:

> "I examined the Greek style olives the same date they were brought to our store." (Tr. folio 67, page 83.)

Testimony of F. Romeo:

> "About the middle of June I went to New York and there saw the olives that were covered by these two invoices." (Tr. folios 43, 44, page 51.)

Again:

> "After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were examined; that was the understanding." (Tr. folio 48, pages 58-59.)

Third, that the said goods were fully examined. See testimony last above cited; also

Testimony of Giovanni F. Romeo:

> "The olives were first examined by me on the date they were withdrawn from the pier. I opened eight or ten barrels of Greek olives not previously opened by Mr. Italiano and Mr. Lodato. They opened and examined some barrels in the store before I did. When I came to the office on the day of the arrival of these olives and was informed that they had arrived, I immediately examined them. * * * Mr. Lodato and Mr. Italiano had opened some barrels before I arrived at the store." (Tr. folio 73, page 91.)

Fourth, that after examination the goods were commingled with other goods and carried in the general stock of the defendant.

Testimony of Giovanni F. Romeo:

> "The olives under Exhibits 'L' and 'N' were commingled and there were no identifying

> marks whereby we could subsequently tell the olives of one shipment from those of another. * * * In selling the ripe olives we could not tell whether they were from Exhibit 'L' or Exhibit 'N'." (Tr. folio 70, page 87.)

(Note: The olives affected by this transaction were represented by Exhibits "K" and "L".)

Again:

> "I again examined the Greek style olives at different intervals when I showed them to customers or brokers." (Tr. folio 69, page 85.)

Again:

> "While remaining in our possession, these olives were shown to the customers and to brokers in the trade for the purpose of selling them." (Tr. folio 76, page 96.)

Fifth, that thereafter the said goods were sold, not at auction sale or at a sale for the benefit of Mennillo, but were sold in the ordinary course of trade of the defendant over a period of over one year from their receipt, as first-class olives.

Testimony of Morris Levenkind, called for the defendant:

> "Q. Did you during the year 1920 do any business with F. Romeo & Co., Inc.? A. I did.
> Q. Did you buy from them any ripe olives?
> A. I did.
> Q. Of the style known as Lindsay Brand?
> A. I did.
> Q. About what time in 1920, do you know?
> A. In May.
> Q. State what you found as to the condition of these olives.
> By the COURT. In May, 1920?

Mr. FERRARI. Yes, your Honor.

The COURT. That is a year after this transaction.

Mr. FERRARI. Yes, but the testimony given shows that they are the same olives.

A. We bought the olives to be *No. 1 goods,* and after we took them in the house and shipped them to our customers we started to get complaints." (Tr. folios 83, 84, pages 106, 107.)

Again:

"Q. When did you buy these olives, the ripe olives, from Romeo & Company?

A. During May, 1920.

* * * * * * *

"Q. When you testified you bought one hundred cases of olives from Romeo & Company without examination and shipped them to your trade as A No. 1 olives.

A. I did." (Tr. folios 85, 86, pages 109, 110.)

Testimony of Francisco Romeo:

"We sold these olives because he (Mennillo) insisted that the olives were good quality and before they were a total loss we thought it better to sell them the best we could." (Tr. folio 49, page 59.)

Testimony of Giovanni F. Romeo:

"These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store." (Tr. folio 70, page 87.)

Again:

"While remaining in our possession these olives were shown to customers and to brokers

in the trade for the purpose of selling them." (Tr. folio 76, page 96)

The foregoing testimony shows conclusively that while the firm of Romeo & Co. were protesting about the condition of the olives and were threatening rejection, no rejection was in fact made and the goods were accepted, commingled with others from which they could not be segregated and sold as first class goods to the customers of the defendant. Moreover no account was ever given to Mennillo showing the amount that was received by the defendant for the sale of said goods nor, in fact, was it possible for the defendant to have given Mennillo an account of the sale of said goods by reason of the fact that the defendant had commingled them with others.

The testimony is also overwhelming to the effect that F. Romeo & Co. knew that the Bank of Italy was interested in these goods, at least to the extent of $5743.63, and yet not a single word of protest was sent to the Bank of Italy concerning the character of the goods nor was there ever an attempt made by the defendant to render an account to the Bank of Italy, nor was the Bank of Italy ever notified that on the payment of $8000, which the defendant had paid to Mennillo, the Bank of Italy might have the return of the goods. Under these circumstances the plaintiff in error contends that it was absolutely entitled to an instruction from the Court to the jury to the effect that there was no rejection of the goods and that the acts of the de-

fendant amounted to an acceptance. An instruction along this line was not only not given but the Court instructed the jury that the acts of the defendant were in keeping with its duty and were in no manner an acceptance of the goods.

> "So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, *then it was not the duty* of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and if thereupon Mennillo & Company remained silent or failed to direct what should be done with the olives, *the defendant had the right,* and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligation to make as much of a salvage as possible." (Tr. folio 95, pages 121, 122.)

Even if the Court had permitted this question to be decided by the jury without any suggestion that the defendant Romeo & Co. acted pursuant to its obligation and duty the plaintiff in error would not complain, but as the matter was presented to the jury the plaintiff was prevented from having a fair trial upon this issue and we respectfully contend that on this phase of the case the verdict of the jury is not sustained by the evidence.

AUTHORITIES SHOWING ACCEPTANCE.

On this point Benjamin on Sales, 6th Edition, at page 855, states as follows:

> "When goods are sent to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance another. *But receipt will become acceptance if the right of rejection be not exercised within a reasonable time or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods.*"

At page 859, the same author quotes from the case of Parker v. Palmer, 4 B. & A. 387, as follows:

> "In Parker v. Palmer the buyer, after he had seen fresh samples drawn from the bulk of rice bought by him which was inferior in quality to the original sample, offered the rice for sale at a limited price at auction but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but held that by dealing with the rice as owner after seeing that it did not correspond with the sample, he had waived any objection on that score."

Particularly in point also is the quotation from the opinion of Lord Abinger in the case of Chapman v. Morton, cited by the same authority:

> "We must judge all men's intentions by their acts and not by expressions in letters which are contrary to their acts. If the defendant intended to renounce the contract he ought to have given the plaintiffs distinct notice at once that he repudiated the goods and that on such a day he should sell them by such a person for

the benefit of the plaintiffs. The plaintiffs could then have called upon the auctioneer for the process of the sale. Instead of taking this course the defendant has exposed himself to the imputation of playing fast and loose declaring in his letters that he would not accept the goods but at the same time preventing the plaintiffs from dealing with them as theirs."

From the two cases just cited, Benjamin, at page 860, deduces the following rule:

"The two preceding cases showing that a resale by the buyer after he had an opportunity of exercising an option either of accepting or of rejecting the goods delivered, is an acceptance, for by reselling he is presumed to have determined his election."

On the same subject, from Volume 23, page 259, of Ruling Case Law, we quote the following:

"In case of an executory contract of sale the buyer as a general rule is entitled, before accepting the goods, to a full opportunity of inspecting the same to see if they comply with the requirements of the contract and for this reason where goods are shipped to the buyer by carrier under an executory contract calling for goods of a certain quality, his reception of the goods is not necessarily an acceptance. *On the other hand, receipt will become acceptance if the right of rejection is not exercised within a reasonable time or if anything be done by the buyer that he would have no right to do unless he were the owner of the goods.*"

A case very much in point and having all the elements of the case at bar is that of Fred W. Wolf Co. v. Monarch Refrigerating Company, decided

by the Supreme Court of Illinois, December, 1911, and reported in Volume 96 N. E. at page 1063. This was an action brought by the seller against the buyer for the sale and installation of a refrigerating plant. Buyer, by letter, rejected the plant on the ground that the engine which was installed to operate said plant was defective and did not meet the requirements of the contract and endeavored, as a defense, to set off against the claim of the seller the value of said engine. It appeared, however, that while the buyer in writing rejected the plant, it continued to use the same in the carrying on of its business. The Court directed a verdict in favor of the seller and the buyer took an appeal. We quote from the opinion of the Court at page 1066:

> "Since the verdict was directed for the appellee (seller) all testimony which contradicts that in favor of the appellant (buyer) must be disregarded and all inferences must be drawn most favorably to it. The evidence cannot be weighed, and, if the facts are reasonably capable of a construction favorable to the appellant, such construction must be adopted. It must, therefore, be regarded as established that the plant delivered did not meet the requirement of the specifications, and that the appellant (buyer) was not bound to accept it. It will be assumed for the purpose of this case, though we do not express any judgment about it, that the letters of the appellant (buyer) declining to accept the engine constituted a notice in writing of the rejection of the plant. The questions then presented are whether the contined use and operation of the plant, including the engine, by the appellant after its rejec-

tion, before suit was brought, constituted, in law, an acceptance of the plant, or whether there is in the record any evidence reasonably tending to explain such use and operation on some other theory than an acceptance and whether, if there was such legal acceptance, the appellant thereby, under its contract, waived any claim for damages on account of the appellee's breach of its contract.

"It cannot well be contended that the appellant's continued use of the engine after May 26th did not constitute an acceptance of the plant unless the circumstances attending such use so qualified the act as to prevent its having the ordinary effect. The test was completed, the appellee had withdrawn its engineer, claimed to have performed its contract, and was demanding payment. The plant was then tendered in satisfaction of the contract. If it conformed to the contract the appellant was bound to accept it. If it did not substantially conform to the contract, the appellant had the right to accept or reject it, at its option. If it chose to retain and use the engine, it thereby accepted the ownership of it.

"Any act done by the buyer of goods tendered in fulfillment of a contract of sale, which he would have no right to do if he were not the owner, constitutes of itself an acceptance of the goods.

"Even though the appellant had determined to reject the plant, and though its letters to the appellee and its attorneys be regarded as sufficient notice, in writing, of such rejection, it could not retain possession of the property and use it for its own profit in its business and at the same time insist upon the rejection. The two things are utterly inconsistent. While the appellant is actually accepting and using the plant, its words of rejection are unavailing. Where machinery has been bought on approval,

> tried, found defective and unsatisfactory, and notice of rejection has been given, and where, nevertheless, the vendee has continued to use the machinery, such use amounts to a waiver of the right to return the machinery and an election to accept it."

Another case very much in point is the case of Cream City Glass Company v. Friedlander, 84 Wis. page 53. This case involved the sale of certain soda ash to be used in the manufacture of glass. The buyer, upon the arrival of the goods, notified the seller that the goods were rejected for the reason that they did not comply with the specifications of the contract and were not fitted for the manufacture of glass. After the rejection the buyer, in order to test the soda ash, used six tierces of the same to experiment and to test of its fitness for the manufacture of glass. We quote from the decision of the Court as follows:

> "Could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection? It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. But this test is plainly for the purpose only

> of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. They must do no act which they would have no right to do unless they were owners of the goods. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. * * * The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected and was owned by defendant. It follows that the judgment must be reversed."

In the case of Ackerman v. Santa Rosa-Vallejo Tanning Company, 257 Federal, page 369, this Court used the following language:

> "The delayed acceptance by the buyer of the leather that had been once rejected was a waiver of the defects in the leather, and of contract requirements as to the quality of the merchandise."

To the same effect as the texts and cases above cited is the case of Noble v. Olympic Brewing Company, 117 Pacific, page 241. In said case the brew-

ing company had ordered certain material for the manufacture of barrels. It was delayed in shipment and when the material arrived it was examined by the brewing company and found defective and rejected, and the owner notified. By reason of the extreme needs, however, of the brewing company, it was necessary to use some of the defective material in order to continue its business. It was held that the use of the material after the rejection amounted to a waiver of the defects in quality and that judgment for the value of the goods delivered, against the said company, was proper.

The foregoing authorities are peculiarly applicable to the facts in the case at bar. As has been shown by the testimony heretofore noted, the defendant in this case was protesting very insistently with regard to the quality of the goods, but at the same time was selling the goods as first class to its customers and this continued for a period of over a year. Moreover the goods in question were commingled with other goods belonging to the defendant. These acts were absolutely inconsistent with any claim of rejection. At all times the evidence in this case shows that the acts of this defendant with reference to the goods in question, were acts of ownership and by exercising said acts of ownership over the goods the defendant waived its right to reject the same.

It will undoubtedly be claimed by the defendant, as it was intimated by the trial Court, that it was the duty of the defendant to sell the goods in order

to lessen the damage and in order to obtain as much salvage out of the transaction as possible. The fallacy of this argument lies in the fact that the uncontradicted evidence in this case shows that the goods were not sold by the defendant for the account, or in the name of, Mennillo, but were sold in the ordinary course of business by the defendant to its own customers and trade and without attempting at any time to account to the defendant for the sale of the goods, and further, that the goods in question were commingled with other goods of the defendant.

If the defendant in this case relied upon a rejection and was selling the goods in order to lessen the damage it was the duty of the defendant under the authorities that we have just cited first, to keep the goods separate from any other goods of a similar character belonging to the defendant; second, to sell in the name of the defendant; third, to sell promptly, and fourth, immediately after the sale to account to Mennillo for the proceeds of said sale. The apparent claim of the defendant that it had the right to sell the goods in the ordinary way and if the sale resulted in a profit, that the goods would be accepted, and if the sale of the same resulted in a loss, the defendant could avail itself of a rejection, conforms neither to the law, nor to the sense of justice.

OPINION OF THE TRIAL JUDGE.

In deciding the motion for a new trial, the learned trial judge begins his opinion with the following statement:

> "At the time of the trial I entertained, and I still entertain grave doubts whether testimony is receivable for the purpose of establishing the oral agreement or contract pleaded by the plaintiff. * * * The instant case is a striking illustration of the peril to commercial transaction of recognizing the validity of oral understanding."

To establish that an oral promise to accept a bill of exchange is valid, we cite the following authorities:

Nelson v. First National Bank of Chicago, 48 Ill., page 36,

from which we quote:

> "All cases agree in holding that in order to make a promise of this character binding in favor of a person who has received a bill, the bill must have been taken on the faith of the promise; but where it has been so taken, it is now the settled American law that the promisor must make his promise good."

Willis v. Rich, 80 N. Y. 269,

from which we quote:

> "An oral promise to guarantee payment of a note is binding and without the statute where it amounts to the original obligation of the promisor."

Norton on Bills and Notes, 3rd Edition, page 100,

from which we quote:

> "It is undoubtedly the law that oral acceptances of existing bills are valid and binding acceptances. The reasons given for this rule are much the same as those given for separate acceptances in writing. A verbal promise is treated as an acceptance because of the sound principles of morality that one who promises another although by parol, to accept a particular bill of exchange and thereby induces him to advance his money upon such bill, in reliance upon such promise should be held to make good his promise. The party advances money upon an original promise and upon a valuable consideration and the promisor is bound to carry out his undertaking. Whether it is held to be an acceptance or whether he is subject to damages for breach of his promise to accept, or whether he is held to be estopped from impeaching his word, is a matter of form merely, the result in either case is to compel the promisors to pay the amount of the bill and interest."

To the same effect we also call attention to the following cases:

Scudder v. Bank, 91 U. S. 406;
Sturges v. Bank, 75 Ill. 595;
Dull v. Bircher, 76 Pa. St. 255;
Elliott v. Miller, 8 Misc. 132;
Townsley v. Sumerall, 2 Pet. 170;
Scott v. Pilkington, 15 Abb. Prac. 280;
Williams v. Winans, 14 N. J. Law 339.

But in the case at bar even if the oral promise to accept was absolutely invalid on the ground that the same was not in writing, under the facts in this case the defendant would still be liable thereon on the theory that the contract had been executed on the part of the bank and, therefore, it was removed

from the operation of the statute of frauds. In others words, the evidence shows that the bank, in reliance upon the oral promise, parted from its money and had fully performed all that was required of it to be performed under the contract, and under said circumstances, the defendant, having received the benefit of the contract, could not take advantage of the claim that the promise to accept was invalid on the ground that it was not in writing. We shall only refer to a few of the authorities sustaining this well established principle.

> "A part performance of parol agreement to execute a written lease of land for more than one year takes the agreement out of the operation of the Statute of Frauds."
>
> McCarger v. Rodd, 47 Cal. 138.

> "Parol promise to answer for debt or default of another is valid when executed."
>
> Schultz v. Nobel, 77 Cal. 79.

> "Part performance of contract to erect a building on land of another in consideration of its occupancy for life by the builder takes it out of the operation of the Statute of Frauds."
>
> Manning v. Franklin, 81 Cal. 205 .

> "Part performance of a verbal contract to sell land takes it out of the operation of the Statute of Frauds."
>
> Calanchini v. Branstetter, 84 Cal. 249.

To the same effect we also quote the following:

Bates v. Babcock, 95 Cal. 479;

Hill v. Denn, 121 Cal. 42;

Norris v. Lilly, 147 Cal. 754;

Churchill v. Russell, 148 Cal. 1;
Husheon v. Kelley, 162 Cal. 656;
Bree v. Wheeler, 4 Cal. App. 109;
Mills v. Jackson, 19 Cal. App. 695;
Winkler v. Jerrue, 20 Cal. App. 555;
Heffernon v. Davis, 24 Cal. App. 295.

We therefore submit that an oral promise to accept a bill is valid and that even if it were not valid, the fact that the contract in question was executed in so far as the Bank of Italy was concerned, would make the promise binding even though invalid.

We fail to see the significance of the statement of the Court to the effect that the instant case shows the peril to commercial transactions of recognizing oral understandings. Surely the fact that the Bank of Italy was willing to take the word of Romeo and Co. could in no way have jeopardized the defendant in this case, and we fail to see that any undesirable result could have possibly arisen if the defendant had lived up to its promise. If the observation of the learned trial judge is correct, then the law should be immediately amended that all commercial transactions be evidenced by writing, but it is a matter of common knowledge that out of the multitude of large business transactions which daily take place, very few of them are evidenced by writing.

The learned trial judge in his opinion states, and he instructed the jury, in substance, to the same effect, that, "if the obligation to pay was to be absolute, there was no conceivable reason why

the plaintiff should not have taken Romeo's signature." Our answer to this is that there was a very good and logical reason why Romeo did not want to accept the draft at the time the transaction was consummated in Los Angeles. At said time there was no way for Mr. Romeo to know when the goods would arrive in New York and Mr. Romeo was evidently anxious to have the draft mature at least sixty days after the goods arrived in New York. In all probability Mr. Romeo thought that during said sixty days period the goods would probably be disposed of and the draft met with the proceeds. Had Mr. Romeo accepted the draft on May 2nd, at sixty days' sight, he might have been confronted with the possibility of being called upon to pay the draft before the goods arrived.

VALIDITY OF EXCEPTIONS TO INSTRUCTIONS OF THE COURT.

In settling the bill of exceptions the learned trial judge included the instruction of the Court, but reserved for the decision of this Court whether or not said instructions were properly included in said bill of exceptions. The defendant in this case objected against including in the bill of exceptions the instructions of the Court on the ground that the exceptions taken by plaintiff to said instructions were not sufficient. The following is a summary of the proceedings that were had in the trial of said case having to do with the taking of exceptions to adverse rulings.

"Mr. GORRILL. We object to the admission of the draft because it shows no acceptance by F. Romeo & Co., the drawee, and there is no evidence of any written acceptance of the draft.

The COURT. Overruled.

Mr. GORRILL. May I have an exception to your Honor's ruling?

The COURT. You may have exceptions to all adverse rulings.

Mr. GORRILL. Without specially asking for them every time, your Honor. It will be understood that each side is excepting to adverse rulings without noting them?

The COURT. Yes."

(Reporter's Tr. page 6.)

At the conclusion of the charge to the jury by the Court the following proceedings took place:

"Mr. FERRARI. May I have an exception to the charge, your Honor?

The COURT. You may have the exception, but a general exception will be of no avail to you.

Mr. FERRARI. Well the only part I object to is that portion with reference to the effect of accepting the oral promise, and also——

The COURT. The effect of accepting the oral promise? I don't believe I understand what you mean.

Mr. FERRARI. That portion of the charge that the Court instructed the jury that they should take into consideration the effect of accepting the oral promise——

Mr. TROWBRIDGE. And we would like to have the record show that the jury has gone out, your Honor.

The COURT. Of course they are gone from the box but are in the corridor and I will have them return if you so desire and permit either side to take exceptions. The jurors are still

deemed to be present, and I will recall them if I desire to modify the instructions given.

Mr. TROWBRIDGE. We have no exceptions, your Honor.

The COURT. That is all then."

(Tr. folios 96 and 97, pages 123-124.)

The plaintiff respectfully contends first, that under the stipulation between Court and counsel no exception was necessary to be taken to the charge of the Court, it having been agreed that all adverse rulings would be deemed excepted to and secondly, that even if said stipulation had not been entered into, the exception actually taken was sufficient.

The stipulation in question covered all adverse rulings. Adverse rulings on giving, or failing to give, an instruction was embraced in the stipulation and was as important to the parties as rulings with reference to the rejection or the allowance of testimony. If the counsel or the Court had desired to limit the stipulation simply to ruling made upon objections to testimony, they were at perfect liberty to do so, but as the stipulation that was made did not restrict its operation to any class of objections, a fair interpretation thereof makes the same equally applicable to the instructions of the Court as to the rulings on testimony.

It will be noted that in the statement of the Court and the statement of counsel which made up the stipulation in question, "adverse rulings" are referred to and not adverse rulings on matters having to do with the introduction or rejection of testimony

and under the circumstances where the defendant is endeavoring by a technicality to prevent a review of the instructions of the Court, we submit that the stipulation in question should be liberally construed to the end that the instructions may be included in the bill of exceptions and considered in this proceeding. If the instructions are correct the defendant can suffer no harm. If they are erroneous, the plaintiff will suffer an injustice.

On the second point it appears that plaintiff did take exception to the charge of the Court. The Court stated that a general exception would not avail and the counsel for plaintiff endeavored to specify the objections to the charge, but was interrupted by the Court and counsel for the defendant. While it is undoubtedly true that a general exception to a charge is unavailing, nevertheless in the instant case where the Court gave all the instructions of its own motion, of which neither counsel had a copy, it is hard to conceive how the objections could have been taken in any other manner. Had the usual practice of giving or rejecting the instructions as submitted by the parties been followed, it would have been an easy matter for counsel to have designated the instructions by numbers and excepted either to instructions given or to the failure to give others, but as the instruction was given practically as one instruction, the exception taken is practically all that was possible under the circumstances.

We therefore respectfully submit that the technical objection that the exception taken by plaintiff

was insufficiently stated, in the interests of justice, be overruled and the instructions of the trial Court reviewed in this proceeding.

CRITICISM OF INSTRUCTIONS OF THE TRIAL COURT.

We have heretofore made some criticism of the instructions of the Court set forth in folio 105, page 131 of the transcript. We might add at this time that said instruction, and those that follow it, are subject to the criticism that the Court in calling to the jury's attention matters that they could consider in arriving at a verdict, fails to tell the jury that they should consider primarily the testimony of witnesses that was produced before them. And furthermore, that the instruction was practically an argument to the jury to find in favor of the defendant irrespective of the evidence.

In the next instruction contained in Exception 12, folio 105, page 132 of the transcript, the Court instructs the jury as follows:

> "And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with."

The Court thereupon proceeds to argue and to instruct the jury as a matter of law and fact in a manner which would lead the jury to believe that in the opinion of the Court the Bank of Italy did not part with anything of value on the strength of this

promise. The matter stated in this instruction was not at issue during the case in any manner. Counsel for the defendant made no such contention during the trial of the case, nor in his argument to the jury. All the evidence in the case clearly, without conflict or contradiction, showed that the bank parted with absolute value.

Testimony of C. R. Mennillo:

> "We were given credit by the bank for $13,-743.63. * * * F. A. Mennillo & Company has never repaid the Bank of Italy for this money. I know the Bank of Italy gave F. A. Mennillo credit for the amount of this draft. I had the bank book and it was entered in said book. I know also from the bank's statement." (Tr. folio 36, page 42.)

Testimony of James O. Moore:

> "I thereupon gave F. A. Mennillo & Co. credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with $8,000 and with $5743.63. * * * I left the Bank of Italy on December 13, 1919, and up to that time neither F. A. Mennillo nor F. Romeo & Company had reimbursed the Bank of Italy." (Tr. folio 38, page 45.)

Testimony of James E. Fickett:

> "The records of the Bank of Italy show that it has never received payment for this draft neither from F. Romeo & Company nor from Mr. Mennillo, and that this draft is carried in our suspense account." (Tr. folio 25, page 27.)

Testimony of T. W. Lacy:

> " * * * Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo

& Co., which we did, and we gave R. Mennillo & Company credit for the face value of the draft." (Tr. folio 39, page 46.)

Testimony of F. A. Mennillo:

"I was paid for this shipment through the Bank of Italy; I was paid in currency put to the credit of my account in the same bank in Los Angeles. I don't know if they credited all at one time or at different times, but I got credit for the full amount of the invoice for both cars." (Tr. folio 29, page 33.)

This testimony would have, undoubtedly, been supported by further testimony had counsel for the defendant given any intimation that there was to be any contention that the Bank of Italy had not parted with actual value for the draft, or if the defendant had in any way offered any testimony to controvert this point. This instruction, coming as it did, when the plaintiff could not offer any proof to show that the same was not founded on the evidence, or without any opportunity to argue the matter to the jury, prevented the plaintiff from having a fair and impartial trial on this issue.

The instruction was furthermore subject to the criticism which we made to the previous one, namely, that it told the jury practically to disregard all the testimony on this point and to speculate on what might have been the fact. While the evidence shows, without conflict, that the bank parted with the face value of the draft, it was by no means incumbent upon the plaintiff to have proved consideration to such an extent. If plaintiff gave any consideration

whatsoever for the promise of the defendant to accept the draft, or in any way changed its position, the defendant was bound to fulfill the promise. Besides this, the matter discussed by the Court could only have become an issue if the defendant in this case had pleaded lack of consideration, but the defendant failed to plead in its answer any lack or failure of consideration, nor did the defendant prove, or attempt to prove, that no consideration was given, or in any way dispute or raise an issue with reference to said consideration.

We submit that it is unfair to the plaintiff to have the jury decide this case upon an issue that was not raised by the pleadings and was not involved in the case. If there be any contention on behalf of the defendant that there was a lack or a failure of consideration in this case, the defendant should be permitted to amend its answer and a trial had upon the issue.

The authorities already cited show the error of the Court's instruction to the jury on the question of acceptance. Throughout said instruction (see Tr. folio 105, pages 133-134) the Court seems to be of the opinion that it was only incumbent upon Romeo & Co. to notify Mennillo that the olives were unsatisfactory. In other words, that it was only necessary for the defendant to complain about the condition of the olives. This clearly is not the law. It was the duty of the defendant immediately upon learning of the unsatisfactory condition of the olives to reject the same and after the rejection, not to per-

form any act with reference to said olives consistent with ownership thereof. In light of the undisputed fact that the olives were commingled with those of defendant, were sold to the trade for a period of over a year, the Court should have instructed the jury as a matter of law that the acts of the defendant with reference to the olives amounted to an acceptance and, irrespective of the fact of whether the promise to accept the draft was conditional or unconditional, that the plaintiff was entitled to recover. The Court also failed to take into consideration the fact that if the defendant availed itself of any alleged right of resale for the benefit of Mennillo & Company, that it was incumbent upon the defendant to sell in the name of Mennillo for his benefit, and to account to him for the proceeds. None of these facts are shown by the evidence and the instruction of the Court on this point led the jury to believe that it was perfectly proper for the defendant to have sold these goods in the ordinary course of trade, in its own name, without accounting to Mennillo & Company. For the reasons just stated, therefore, it is respectfully submitted that said instruction was erroneous and highly prejudicial to the rights of the plaintiff.

ADVERSE RULINGS.

The Court sustained an objection to a question propounded to the witness Lacy in which it was attempted to have the witness explain in what sense

the word "accept" was used. This ruling, we claim, clearly violates the well settled principle that a witness has always the right to explain his answer or to explain the meaning that he has attached to any word.

(Tr. folio 102, page 129.)

Objections Numbers II, III, V, VI and X as contained in the Assignment of Errors (see Tr. folios 102-103, pages 129-130-131) all involved the same point. The defendant in this case endeavored to elicit conversations, agreements and contracts with reference to the transaction in question which took place outside of the presence of the plaintiff or any of its representatives. Clearly said conversations, agreements and communications were hearsay and not binding on the plaintiff. For instance, certain of these matters had to do with a conversation between Mennillo and Romeo taking place two days before the transaction in question, and which said conversation the evidence shows was never called to the attention of the Bank of Italy.

A contract between Mennillo and Romeo was also admitted in evidence, as were certain telegrams and communications between F. Romeo and the defendant. To all of said testimony the plaintiff objected upon the ground that it was hearsay and not binding upon the plaintiff, but the Court overruled the objection and an exception was noted.

Had this case been tried before the Court without a jury it is doubtful whether these adverse

rulings would have prejudiced the case in the mind of the judge for the reason that he is experienced in the consideration of evidence and would probably give the said evidence very little weight. But the case at bar was tried before a jury and as we have shown, there was an absolute absence and failure of proof showing that any agreement or understanding was made with the Bank of Italy concerning the conditional nature of the promise to accept. Unquestionably these conversations, hearsay as to the plaintiff, and these contracts and these communications which tended to show that there was an understanding between Mennillo and Romeo to the effect that the payment of the draft was to be conditional, greatly prejudiced the case of the plaintiff and undoubtedly served to supply, in the minds of the jury, the evidence that was lacking in the record to prove the conditional nature of the promise.

MOTION FOR A NEW TRIAL.

Plaintiff in this case within the time allowed by law, interposed a motion for a new trial in the above entitled action, urging the same points which are set forth in this brief, and we submit that upon all the grounds heretofore alleged, the said motion for a new trial should have been granted, and that in the denial of said motion for a new trial, the said District Court committed prejudicial error.

CONCLUSION.

Wherefore the Bank of Italy, plaintiff in error, prays that the judgment of said District Court be reversed for the reasons hereinbefore set forth.

Dated, San Francisco,
February 11, 1922.

LOUIS FERRARI,
Attorney for Plaintiff in Error.